IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

MONDAY, THE 25TH JUNE 2007 / 4TH ASHADHA 1929

SA.No. 277 of 1993()

(AGAINST THE JUDGMENT AND DECREE DATED 18/02/1993 IN A.S.NO.15/89 ON THE FILES OF DISTRICT COURT OF KOTTAYAM ARISING FROM JUDGMENT AND DECREE DTD. 31/10/1988 IN O.S.9/1983 ON THE FILES OF MUNSIFF COURT OF CHENGANACHERRY)

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APPELLANTS(RESPONDENTS BEFORE THE LOWER APPELLATE COURT

AND DEFENDANT BEFORE THE TRIAL COURT:

1. **BABU ACHARI, KEECHERI VEEDU, VAZHAPPILLY WEST MURI VAZHAPILLY VILLAGE, CHENGANACHERRY, KOTTAYAM DISTRICT.**

2. **BABU ACHARI REMANI, W/O.BABU ACHARI, KEECHERI VEEDU, VAZHAPPILLY WEST MURI, ..DO... VILLAGE, CHENGANACHERRY, KOTTAYAM DISTRICT.**

BY ADV. SRI.VARGHESE C.KURIAKOSE

RESPONDENT (APPELLANT BEFORE THE LOWER APPELLATE COURT AND PLAINTIFF BEFORE THE TRIAL COURT :

KESAVAN NAMBOODIRI ALIAS KOCHU KESAVAN NAMBOODIRI, KARUMALI MADATHIL, PERIYAMANA ILLOM, VAZHAPPILLY WEST MURI, ...DO... VILLAGE, CHENGANACHERRY, KOTTAYAM DISTRICT.

BY ADV. SRI.M.NARENDRA KUMAR

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 25/06/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

S.A.NO.277/1993

ORDER ON C.M.P.NO.731/1993 IN S.A.NO.277/1993

DISMISSED

25/06/2007 **SD/- M.SASIDHARAN NAMBIAR, JUDGE**

/TRUE COPY/

P.S.TO JUDGE

KSS

M.SASIDHARAN NAMBIAR,J.

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S.A. NO.277 OF 1993

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Dated this the 25th day of June, 2007

JUDGMENT

Defendants in O.S.No.9/1983 on the file of Munsiff Court, Changanacherry are the appellants. Plaintiff is the respondent. Respondent instituted the suit seeking a decree for declaration of his right of way over item No.2 of the plaint schedule property contending that it is the way to item No.1 of the plaint schedule property and for a mandatory injunction to remove the obstruction caused therein by constructing latrine and improvements. Item No.1 of the plaint schedule property is 25 cents in survey No.164/3 of Vazhappilly west village. Item No.2 of the plaint schedule property is a way leading from the northern road to item No.1 of the plaint schedule properties. The property which lies to the north of item No.1 of the plaint schedule property and the west of item No.2 of the plaint schedule property admittedly belongs to the

appellants. Both the property of the appellants and the respondent originally belonged to the family of the Gopala Pillai and others. Under Ext.A3 partition deed, the properties were divided. Executant No.1 Gopala Pillai and Executant Nos. 2 to 6 are respectively, Narayana Pillai, Ramachandran Pillai, Thankappan Pillai, Devaki Amma and Thankamma. The properties shown as schedule A to D were respectively allotted to the share of Gopala Pillai, Narayana Pillai and Ramachandran Pillai and Thankappan Pillai. The properties shown in E schedule were allotted jointly to the share of Devaki Amma and Thankamma. Item No.1 of A to E schedule is Keecheri purayidom which was having a total extent of 36 cents. As is clear from Ext.A3, the southern 12 cents was allotted to Gopala Pillai as item No.1 of A schedule and the remaining 24 cents were divided into 4 parts and allotted to the sharers as B,C, D and E. So also item No.2 nilam lies to the south of Keecheri purayidom. Under Ext.A1 sale deed, the rights of

Narayana Pillai, Ramachandran Pillai, Thankappan Pillai, Devaki Amma and Thankamma over the southern nilam namely item No.1 of the plaint schedule property was purchased by the respondent. Gopala Pillai in turn assigned his rights obtained under Ext.A3 partition deed, along with the property obtained under registered assignment deed 2207/1974. Out of Ext.B3 property, appellants purchased 10 ½ cents under Ext.B1 sale deed executed by the assignee. Appellants are claiming right over the property which lies to the north of item No.1 of the plaint schedule properties under Ext.B1. While item No.1 of the plaint A schedule properties was sold by the assignors under Ext.A1, item No.2 was shown stating that it is the way to item No.1 of the plaint schedule properties. The suit is filed contending that appellants are obstructing the said way and therefore respondent is entitled to a decree for declaration of the right of way over item No.2 of the plaint schedule property. Appellants on their part contended that

there was no such way in existence and respondent has no right of way over item No.2 of the plaint schedule property and respondent is not entitled to the decree sought for. Learned Munsiff on the evidence dismissed the suit holding that respondent did not establish a right of way over item No.2 of the plaint schedule properties. Respondent challenged the decree and judgment before District Court, Kottayam in A.S.15/1989. Learned District Judge on reappreciation of evidence found that the property obtained by appellants and respondent are the properties allotted to the sharers under Ext.A3 and Ext.A3 shows that the properties divided and allotted to sharers are the properties which lies to the east of the existing way which starts from the northern way and reaches item No.2 of the plaint schedule property. Learned District Judge also found that while assigning the property under Exts.B1 and B3, existence of the eastern way was suppressed and it is on that basis that appellants are claiming that there is no way and

their attempt is to encroach upon a portion of the way also. Learned District Judge on the evidence found that respondent has a right of way to item No.1 of the plaint schedule property over item No.2 of the plaint schedule property as shown by the Commissioner in Ext.C1(a) plan and granted a decree for declaration and for a mandatory injunction. It is challenged in this second appeal.

2. The second appeal was admitted formulating the following substantial questions of law.

1) When a declaration of right of way over immovable properties as claimed, is not the court to consider the nature and character of the right as well as the extent to which the right is claimed?

2) Was the first appellate court justified in declaring a right of way over item No.2 of the plaint schedule property, without declaring what is his right?

3. Learned counsel appearing for appellants and respondent were heard.

4. Learned counsel appearing for appellants vehemently argued that first appellate court did not consider what was the right of way available to the respondent and as the finding was that item No.2 of the plaint schedule property does not belong to appellants under Ext.B1 sale deed, learned District Judge should not have granted a decree for declaration of right of way in favour of the respondent. It was argued that as long as item No.2 of the plaint schedule properties does not form part of the property divided under Ext.A3, there is no question of right of easement by grant. It was also argued that in any case when the evidence of respondent himself shows that after the appellants purchased the property under Ext.B1, the right of way was obstructed, first appellate court should have found that right of way if any is barred by limitation and therefore respondent is not entitled to the declaratory decree granted by first appellate court. Learned counsel appearing for respondent argued that in the plaint itself it

was specifically pleaded that the right of way claimed by respondent is the right which was available to item No.1 of the plaint schedule property when the entire properties were divided under Ext.A3. It was argued that Ext.A3 shows that the property which was allotted to the sharers, was the property which lies to the west of the existing way and that way touches item No.1 of the plaint schedule properties and therefore the right of way was apparent at the time when the property was divided under Ext.A1 and when under Ext.A1 that right was transferred in favour of the respondent, respondent is entitled to a right of way as provided under section 13(b) of Indian Easement Act. It was further argued that when respondent has a right of way by quasi easement, as provided under section 47 of the Indian Easement Act unless the obstruction was for a period of 20 years, the suit is maintainable. Reliance was placed on the decisions reported by this court in **Kochan**

Ramanathan v. Kochan Natarajan (1990(2) KLJ 617) and a learned single Judge of the High Court of Andhra Pradesh in **K.Kanakamma v. T.Ranga Rao (AIR 1957 A.P. 419).**

5. On hearing learned counsel appearing for appellants and respondent and on going through the records and the judgment of the courts below, it is clear that the right claimed by respondent was not properly considered by the courts below. Respondent is claiming a right of way to the property purchased under Ext.A1, as provided in Exts.A1 sale deed. Under Ext.A1 while assigning item No.1 of the plaint schedule properties, over which assignors have absolute right, was conveyed, their right of way over item No.2 of the plaint schedule properties was also conveyed.

6. Respondent has no case that item No.2 of the plaint schedule properties was part of the property divided under Ext.A1. On the other hand, the very case was that the property which was divided and

allotted was the property, which lies to the west of the eastern edavazhy. True, Ext.A2 title deed of the eastern property, the Konthachammuri purayidom, also shows that the eastern boundary of that property is the way which is the very same way shown as the western boundary. Therefore as rightly found by first appellate court, existence of a way which lies to the west of Konthachammuri purayidom and to the east of Keecheri purayidom which was divided under Ext.A3, cannot be disputed. That way definitely leads to the northern way. The question is whether respondent has a right of way over item No.2 of the plaint schedule property. As found by first appellate court, appellants being the assignees of Gopala Pillai, executant No.1 of Exts.A1, can only claim right over Keecheri purayidom which lies to the west of the eastern edavazhy. Therefore to that extent, appellants are not entitled to obstruct the pathway available to item No.2 of the properties.

7. But the crucial question is what is the

right of way available to item No.1 of the plaint schedule property and whether respondent is entitled to a decree for declaration of that right in the suit.

8. That question was not considered by the first appellate court. Especially when the right of way claimed is only a right of quasi easement, on the basis that item No.2 of the plaint schedule property is the way available to item No.1 of the plaint schedule property at the time of Ext.A3 partition as well as under Ext.A1 assignment deed obtained by the respondent, it should have been divided. As this aspect was not considered by the courts below, the appeal is allowed. The decree and judgment passed by first appellate court is set aside and the suit is remanded back to the trial court to dispose the suit afresh in the light of the discussion made earlier. It is made clear that the trial court has to locate the way which was in existence as mentioned in Ext.A1 partition deed and find out whether respondent is entitled to

a right of way and if so, what is that right and whether respondent is entitled to a decree for declaration of that right. The parties are directed to appear before the Munsiff Court, Changanacherry on 31.7.2007. Send back the records immediately.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

S.A.NO.277 /1993

JUDGMENT

25TH JUNE ,2007